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Supreme Court, U.S.
FILED
MAR 18 2005
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No. 04-480

IN THE
Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,
Petitioners,

v.

GROKSTER, LTD., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR SONGWRITER AND MUSIC PUBLISHER PETITIONERS

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March 18, 2005

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ARGUMENT

Grokster and StreamCast do not even try to justify their willful exploitation of copyright infringement. They avoid discussion of their own conduct, purporting instead to champion the interests of innocent "innovators" in need of sanctuary from the copyright laws or, at least, an opportunity to plead their case in Congress rather than the courts.

In this brief, we address those arguments on their terms, but not first without a word about respondents' false construct. As the record makes clear, Grokster and StreamCast are *not* innocent innovators. They have no genuine claim to concerns about the broader policy ramifications of a decision in this case, or any real expectation of a sympathetic ear from Congress. Even respondents' *amici* make a point of distancing themselves from the actual businesses of respondents.[1]

That sharply undercuts the force of respondents' policy arguments. Professed concerns about innovation and deference to Congress would be more credible if respondents' *own* conduct was not clearly tied to infringement, or if a decision in petitioners' favor would entail a legal sea change. But, as petitioners' opening briefs demonstrate, the conduct of Grokster and StreamCast brings them well within the traditional rules of secondary copyright liability.

That does not mean that the Court should ignore the implications of its decision for legitimate innovation, or disregard Congressional prerogatives. But the Court should reject respondents' effort to hide behind such

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[1] *See, e.g.*, Internet *Amici* Br. 1 ("None of the Internet *amici* condones copyright infringement and none endorses respondents' particular business model.").

highminded principles when they are running businesses designed to profit from copyright infringement.

Grokster and StreamCast assert two principal policy arguments: that holding them liable would "condemn" the use and development of peer-to-peer ("P2P") technology for legitimate purposes, and that Congress, not this Court, should decide the issue presented in this case. For the reasons stated below, neither argument has merit.

I. HOLDING GROKSTER AND STREAMCAST LIABLE WILL NOT "CONDEMN" P2P.

Respondents are wrong that holding them liable is tantamount to "condemning . . . distribution [of P2P software] as unlawful." Resp. Br. 8. Their warnings about the demise of P2P wrongly equate the infringement-driven services of Grokster and StreamCast with P2P technology itself. P2P is a protocol that facilitates the distribution of content over the Internet. Like other methods of sharing information over digital networks, such as e-mail, instant messaging, or client-server web hosting, P2P may be used lawfully, or it may be abused.

Grokster and StreamCast are P2P abusers. They are not software developers. They are not in the business of refining P2P code. Rather, they use a particular P2P application to profit from infringement. Grokster and StreamCast "brand" generic P2P software, modify it, among other things, to receive advertisements from their servers, and distribute it for free in order to advertise to an audience drawn together by the lure of "free" content — an audience of infringers that Grokster and StreamCast specifically targeted after Napster's demise. They stand in relation to P2P technology as spammers do to e-mail systems.

By contrast, legitimate services are emerging, like Peer Impact and iMesh, that use P2P technology to distribute music online while ensuring that "content owners . . . such as record labels, musical artists and publishers, are paid appropriately for all music shared[.]"[2] Content on Peer Impact's network originates on the company's servers, but copies may be distributed to subsequent purchasers from the computers of members of the network. To encourage sharing, the company uses an innovative business model that allows users to earn points for additional purchases based on the number of files they redistribute. Thus, Peer Impact uses P2P technology not only to realize distribution efficiencies, but also to enlist customers as sales partners. Similarly, iMesh is developing a P2P application that will "integrat[e] existing digital fingerprinting and copyright filtering technology in order to prevent users from unlawfully distributing and/or reproducing copyrighted content that has not been licensed." *See* Bridgemar Br. 2; *see also* Napster Br. 4-6; Harvard Berkman Center, *Content and Control* (Jan. 7, 2005), App. III (describing "P2P stores").

A decision by this Court against Grokster and StreamCast can only *benefit* services that use P2P as a tool for the *lawful* distribution of digital content; services that now are in the untenable position of competing with "free." *See, e.g.*, Napster Br. 8 ("Despite the fact that *amici*'s services offer higher quality files and features . . . *amici* do considerably less volume than Respondents for one simple reason. Respondents offer their stolen content for free, a price impossible to beat for legitimate businesses which acquire the rights to sell their product and support systems to track, account and pay for those rights."); *Content and Control* 15 ("industries' outlook for the

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[2] *See* http://www.peerimpact.com/info/faq.html.

online future would be significantly improved" by controls on illegal file-sharing). That goes not only for services that use P2P technology, but also for services like the iTunes Music Store that rely exclusively on distribution from a central server.

No doubt [illegible] the impediment that their services pose to legi[illegible]online music stores, Grokster and StreamCast criticize the manner in which those services control the distribution of content as "inefficient" by comparison to P2P networks that refuse to exercise control over content. Resp. Br. 7 ("[I]f material sought by a user already resides on other users' computers that can be accessed over already-in-place communication lines, then it is a wasteful redundancy also to store the material on a group of central servers, and to install and operate high-volume communications lines into and out of those servers[.]") (emphasis in original). But what respondents describe as a "wasteful redundancy" are the very controls upon which legitimate services rely in order to sell music online. That music may be "swapped" illegally more efficiently than it may be distributed by parties who compensate copyright owners is no reason to conclude that the law should not protect copyright owners' interests.

Respondents are also wrong to invoke as support for their own services artists who have purportedly "authorized free file-sharing." Resp. Br. 21. The artists respondents cite — including John Mayer, Phish, Pearl Jam, and the Dave Matthews Band — have never authorized distribution of their commercial releases over P2P networks.[3] They do have "taping policies" that allow fans to make

[3] *See, e.g.*, http://www.phish.com/guidelines/index.php?category=6 ("*Phish policy*") ("Officially released recordings of any kind (live or studio) in any format may never be duplicated or otherwise traded or offered in whole or part.").

recordings of live performances and share them with friends.[4] These policies, which uniformly ban any commercial use of such recordings, do not reflect an altruistic waiver of valuable copyrights so much as frustration with "bootleggers" who profit from selling recordings of secretly-taped concerts.[5] In any case, respondents are wrong to equate "fan-friendly" taping policies with a blanket license to distribute fan-produced concert recordings over any P2P network. The hallmark of these policies is that *no one* may profit, directly or indirectly, from the recordings. For that reason, Phish's policy, for example, expressly condemns services that — like respondents' — "accept advertising, offer links for compensation, exploit databases compiled from their traffic, or otherwise derive any commercial proceeds in any form."[6]

There is also evidence that even artists with liberal taping policies, adopted to allow the low-tech exchange of tapes among friends, recognize mass file-sharing as a threat to their ability to earn a living. John Mayer, Phish and the Dave Matthews Band have declined to allow ma-

[4] *See Phish policy*; http://www.dmband.com/legal_popup.asp ("*DMB policy*"); http://www.local-83.com/fc/johnmayer/Join/policies/; http://www.sonymusic.com/artists/PearlJam/tour/taping.html ("*Pearl Jam policy*").

[5] *See Pearl Jam policy* ("[Y]ou won't have to pay $30 or anything like that [to bootleggers]. You can have your own tape . . . your own personal [memory].") (alterations in original).

[6] *See Phish policy* ("[W]eb sites or any other communication forum facilitating audio trading cannot accept advertising, offer links for compensation, exploit databases compiled from their traffic, or otherwise derive any commercial proceeds in any form."). *Cf. DMB policy* ("Any method of trading that does not involve personal fan interaction defeats the spirit of this goal of the taping policy and is not authorized. In particular, posting audio or video files on web sites for streaming to or downloading by the public, is not authorized.").

terial to be uploaded to the Internet Archive, one of the sites that respondents' tout as legitimate (a decision from Pearl Jam is listed as "pending").[7] Phish's explanation for refusing to authorize uploads to the Internet Archive is revealing:

> Our taping policy . . . does not extend to copying . . . performances into a mass library of titles considered by their providers and users to be public domain works for unlimited universe-wide free distribution. . . . The difficulty of enforcing our rights . . . in the fast-changing digital world would be complicated by blanket permission to Internet Archive's Etree Project to include those files at will as part of a universal free library.[8]

As Phish's explanation makes clear, the "authorization" upon which respondents rely is far from an endorsement of the mass distribution that occurs on Grokster's and StreamCast's services.[9]

That some fans may wish to share authorized or public domain material over P2P networks, moreover, does not

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[7] *See* http://www.archive.org/audio/etree-band-showall.php (listing "[b]ands that have opted-out of the Archive project").

[8] *See* http://www.archive.org/audio/etree-band-details.php?band_id=10.

[9] Respondents also note that lesser known artists can use Grokster and StreamCast as a marketing tool. Resp. Br. 22. That some artists not before the Court believe that file-sharing might be beneficial to them, however, is not a legitimate reason to deny *petitioners* their rights. *See New York Times Co. v. Tasini*, 533 U.S. 483, 497 n.6 (2001) ("[E]ven if . . . some authors, in the long run, are helped, not hurt, by Database reproductions, the fact remains that the Authors who brought the case now before us have asserted their rights under § 201(c). We may not invoke our conception of their interests to diminish those rights.").

justify Grokster's and Streamcast's commercial exploitation of unauthorized file-sharing. There is no shortage of services devoted solely to distribution of public domain and authorized material using P2P technology. Respondents cite several of them. Resp. Br. 21. For another example, Furthurnet bills itself as the "first and only 100% non-commercial, open-source, peer-to-peer network of legal live music[.]"[10] The site maintains an "approved band list" and limits sharing of files to those bands by restricting the search function to a drop-down menu of bands on the list. Furthurnet also commits to enforcing its policy against unauthorized trading and retains the ability to terminate the accounts of users who violate that policy. These efforts to limit file-sharing to authorized material contrast sharply with the conscious avoidance of such controls by Grokster and StreamCast.

In addition to their unsubstantiated claims about interference with lawful uses of P2P, respondents and their *amici* offer dire predictions about the impact of holding them liable on innovation and the economy in general. For good reason, the Court has never been persuaded to abandon established intellectual property doctrines by speculative arguments about future harms. *See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyokabushuki Co.*, 535 U.S. 722, 732 (2002) (rejecting claims of chilling effect on innovation from uncertainty and litigation arising out of patent doctrine of equivalents); *Tasini*, 533 U.S. at 504-06(2001) (rejecting claims that a ruling for authors and copyright owners would have "devastating consequences," and noting that "speculation about future harms is no basis for the Court to shrink authorial rights Con-

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[10] *See* http://www.furthurnet.com.

gress established in § 201(c)").[11] There is even less reason to credit them in this case: if petitioners were truly calling for a "radical," innovation-chilling result, one would not expect the United States — representing both the Patent and Copyright Offices here — to support it.

In any event, the notion that liability for Grokster and StreamCast will result in uncertainty by undermining a hard-and-fast rule of sweeping immunity rests on the faulty and self-serving premise that *Sony* established such a rule. Not until the briefing in this case had anyone so argued. To the contrary, the business and legal communities recognized that secondary liability was an inherently flexible concept,[12] and, significantly, acknowledged that

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[11] The Court should also view skeptically arguments by self-interested *amici* about costs and benefits to society at large. *See, e.g., Diamond v. Diehr*, 450 U.S. 175, 217 (1981) (Stevens, J., dissenting) (noting that the numerous *amicus* brief filed in patent cases demonstrate that the questions presented are "not only difficult and important, but apparently also one[s] that may be affected by institutional bias," as "industry representatives have taken positions properly motivated by their economic self-interest").

[12] *See infra* n.15; *see also* Jesse Feder, *Is Betamax Obsolete? Sony Corp. of America v. Universal Studios, Inc. in the Age of Napster*, 37 Creighton L. Rev. 859 (June 2004) (explaining that courts have "struggled to apply the teachings of *Sony* to circumstances that were not contemplated when the Court reached its decision in 1984, producing outcomes that are, at least at first blush, startling in their inconsistency"); Stacey Dogan, *Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies*, 52 Hastings L. J. 939 (April 2001) ("Nearly two decades later, we have little idea of what the copyright staple article of commerce doctrine means. Neither the Supreme Court nor subsequent lower court decisions have elucidated what kinds of products or services can qualify as staple articles of commerce, nor have they provided the kind of framework for deciding whether such an article has a 'substantial non-infringing use.' In the absence of any such guidance, commentators and scholars differ profoundly over the scope of indirect copyright infringement post-*Sony*.").

such flexibility was *not* inherently harmful to innovation. What *amicus* Business Software Alliance said to Congress in 1997 remains true today: "[W]e are not aware of any evidence showing that the absence of a firm rule on the copyright liability of network operators is in any way chilling the development of the Internet, investment in network-based business, or new entrants into these markets." *Copyright Infringement Liability of Online Service Providers, Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (Sept. 4, 1997) (statement of Daniel Burton).

In sum, holding Grokster and StreamCast liable will not "condemn" P2P technology or otherwise chill innovation. It will take one illegitimate business model — operating a P2P service in order to profit from a target audience of infringers — off the table. But it will leave innovators free to operate P2P systems that respect copyrights, and channel the use of P2P away from illegal uploading and swapping of copyrighted works toward distribution of licensed and public domain works.

II. THE COURT SHOULD DECIDE THIS CASE, NOT DEFER TO CONGRESS.

The task of applying principles of secondary liability to a specific factual setting is a paradigmatic judicial function. Respondents argue that, in this case, the paradigm does not hold because (1) there is "substantial uncertainty" as to whether petitioners are being harmed by Grokster's and StreamCast's services; and (2) Congress is, in their view, better suited to define the boundaries of

secondary copyright liability in this area.[13] Both reasons are unpersuasive.

A. Petitioners Are Suffering Immediate, Substantial, and Ongoing Harm.

In claiming that there is "substantial uncertainty about what harm is being caused" by respondents' services, Resp. Br. at 42, respondents completely ignore the demonstration of harm to songwriters detailed in our opening brief. Thanks to the unbridled infringement occurring on the services of Grokster and StreamCast, songwriters' licensing revenues are drying up and songwriters are losing their jobs. *See* JA 290-321 (declarations of songwriters); Songwriter Br. 5-8. And songwriters are hardly the only victims. Illegitimate distribution of tens of millions of perfect digital copies of copyrighted works each day represents enormous harm to artists, musicians, and the many other creative talents who work in the copyright industries, *see* NARAS Br. 3-5; AFM Br. 9-12, to innovative companies distributing digital copyrighted works legitimately, *see* Napster Br. at 8-11, and to the public as a whole, *see* S. Rep. No. 105-190, at 8 (1998) ("*S. Rep.*") ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.").

Respondents' only response to this evidence of harm is to deny the effect of piracy on record sales. Resp. Br. 43-46. But that misses the point. Although songwriters

[13] Respondents also invoke *stare decisis* in the section of their brief urging the Court to stay its hand, Resp. Br. 40-42, but that assumes that *Sony* already decided the issues here. As shown in the petitioners' opening briefs, that is not the case.

certainly lose licensing revenue every time someone illegally swaps a song on a P2P network instead of buying a CD, the harm to songwriters exists independently of lost record sales. As explained in our opening brief, and as expressly confirmed by Congress in 1995, a songwriter has a right to a statutory royalty for each digital transmission of a copyrighted song. Grokster and StreamCast are able to attract a vast audience of users, in part, because they avoid paying these royalties. Lost record sales are not even a good proxy for harm. A more accurate measure is the extent to which use of licensed online music stores is depressed by the effect of "competition with 'free,'" depriving songwriters of royalties from licensed services on millions of transactions. On that score, no one doubts that Grokster and StreamCast are wreaking massive harm. *See supra* pp. 3-4.

Finally, even on its own terms, respondents' claim that harm is uncertain rings hollow. Although analysts may quibble about the effect of illegal file-sharing on record sales from year to year, even the sources relied upon by respondents concede that the harm to the industry is real and growing. *See, e.g.*, *Content and Control* 6 ("Even though evidence that file sharing has caused losses to the music industry is controversial and film industry revenue is currently on the rise, online infringements reasonably can be expected to reduce revenues in the long run."); William W. Fisher III, Promises to Keep 34 (2004) (concluding that any theoretical benefits to copyright owners of services like respondents' "will be swamped by the corrosive effect of easy access to free recordings").[14]

[14] The allegedly "important study" respondents cite, which purports to find no harm, has been roundly criticized, as even respondents' *amicus* recognizes. *See* Fisher Br. 14 & n.25; *cf.* MGM Br.

Moreover, respondents simply ignore the contempt for intellectual property and the rights of others that their services foster.

Targeting the millions of direct infringers — either through lawsuits or self-help measures such as "spoofing" — is not the panacea that respondents suggest. There has been only one criminal conviction of a peer-to-peer user, *see* Resp. Br. 45, and the 8,000 civil suits brought by the record industry are truly a "teaspoon solution to an ocean problem." *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003). *See generally* ASCAP Br. 9-11. "Spoofing" and similar efforts have also failed to stem the tide of infringement. The inefficacy of these measures should be no surprise to respondents and their *amici*, who have done everything in their power to thwart petitioners' litigation and self-help efforts: preventing petitioners from learning the identities of direct infringers, blocking efforts of industry representatives to access respondents' networks, and incorporating sophisticated anonymity features that effectively disable the RIAA "webcrawler" that respondents tout. *See* MGM Br. 8; http://www.morpheus.com/. Similarly, respondents have added sophisticated anti-spoofing software to block industry efforts. *See* http://www.morpheus.com/ (advertising "free . . . anti-spoofing look-ups"); *see also* JA 274-75.

In sum, the harm petitioners are suffering because of illegal file-sharing on respondents' services is real, substantial, and ongoing. Respondents' arguments to the contrary are specious.

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13 & n.10 (Liebowitz paper summarizing studies finding "significant harm").

B. Congress Has Made Clear that It Expects Secondary Liability Principles To Continue To Evolve in the Courts.

Secondary copyright liability is a common law doctrine of long standing. Congress has blessed it and has been content to allow it to evolve in the courts on a case-by-case basis. This case should be no exception.

The development of secondary copyright liability occurred in the courts, in seminal cases like *Kalem*, *Gershwin*, and *H.L. Green*, before Congress had even codified a standard for infringement. Menell Br. 4-6. When Congress finally did so, in 1976, it established the exclusive right "to authorize" use of a work in order "to avoid any questions as to the liability of contributory infringers," S. Rep. No. 94-473, at 57 (1975), but left the development of the doctrine to the courts. Indeed, Congress expressly rejected an amendment that would have defined and limited the "well-established principle of copyright law that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers." *Id.* at 142.

In subsequent legislation, Congress has shown no sign of dissatisfaction with the judiciary's primary role in the evolution of secondary copyright liability; to the contrary, it has repeatedly endorsed it. Perhaps the most powerful example is Title II of the DMCA, 17 U.S.C. § 512. The debate over that legislation involved the same context now before the Court — copyright infringement committed by individuals but facilitated by those offering services on the Internet. Throughout the 1990s, copyright owners filed numerous lawsuits against a variety of Internet services, such as computer bulletin boards, that facilitated the unlawful distribution of copyrighted works, especially

computer software and music. In all of those cases, the bulletin board operators claimed that they merely operated a service for others to exchange information, did not know that particular items exchanged over their services were infringing, and could not control what their users were doing. Courts, however, regularly imposed liability on such entities under the doctrines of contributory and vicarious infringement. *See, e.g., Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996); *Playboy Enters. v. Hardenbaugh*, 983 F. Supp. 1167 (N.D.Ill. 1997).

This series of cases led providers of services on the Internet — including many of respondents' *amici* in this case — to seek Congress's assistance. Contrary to their arguments here that *Sony* provides a bright-line rule to shield them from liability and protect innovation, *amici* in 1998 argued precisely the opposite.[15]

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[15] *See, e.g., World Intellectual Property Organization Copyright Treaty and World Intellectual Property Organization Performances and Programs Treaty, Hearing Before the Senate Comm. on Foreign Relations*, 105th Cong. (Sept. 10, 1998) (statement of Roy M. Neel, President, United States Telephone Association) ("[C]opyright law includes doctrines of contributory and vicarious liability that have been construed by some courts to be very broad. Clear limitations need to be placed on these doctrines[.]"); *Copyright Infringement Liability of Online Service Providers, Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (Sept. 4, 1997) (statement of George Vradenburg, III, Ad Hoc Copyright Coalition) ("As applied throughout these cases, the doctrine of indirect liability creates the fear that ISPs will incur massive damages for acts of infringement committed by others."); *NII Copyright Protection Act of 1995 (Part II): Hearing on H.R. 2441 Before the House Judiciary Subcomm. on Courts and Intellectual Property*, 104th Cong. (Feb. 7-8, 1996) (letter dated Feb. 15, 1996 from Sarah Deutsch, Bell Atlantic Corp., to the Hon. Carlos Moorhead, Chairman) ("The current online liability cases, which have been emerging at a rapid pace over the last two years, is far from a unified body of law.").

In response to the demands of technology companies "to see the law clarified in this area," *S. Rep.* at 19, Congress enacted Title II of the DMCA. Congress rejected, however, requests to articulate the bounds of secondary liability in the statute. "Rather than embarking upon a wholesale clarification of the[] doctrines [of contributory and vicarious liability]," Congress "decided to leave current law in its evolving state and, instead to create a series of 'safe harbors' for certain common activities of service providers" *Id.* Thus, under the DMCA, the liability of providers of Internet services is "adjudicated based on the doctrines of direct, vicarious, or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute, which are unchanged by section 512." *S. Rep.* at 55.

The DMCA demonstrates Congress' determination that the courts should continue to evaluate secondary liability for those providing services on the Internet and that, where necessary, Congress will intervene to establish bright-line safe harbors. Respondents ask the Court to do precisely the opposite — to create a bright-line safe harbor that Congress did not provide, and thereby truncate the doctrines of secondary liability. This cannot be squared with Congress' most recent and most on-point enactment, or with the entire history of secondary liability in copyright.

Respondents' argument that there can be no liability for Grokster and StreamCast absent specific legislation is meritless. In the absence of statutory intervention, the Court should continue its time-honored function of elaborating the law of secondary copyright liability. This is the

process Congress has envisioned — and repeatedly endorsed — in the copyright area.[16]

[16] *See* Hatch-Leahy Br. 4 ("Congress has long and properly respected the role of the federal courts in articulating the traditional doctrines of secondary liability, and indeed assumes the continuing force of those doctrines as it legislates in the area of copyright.").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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